IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

MONDAY, THE 4TH DECEMBER 2006 / 13TH AGRAHAYANA 1928

EFA.No. 37 of 2001(A)

E.A.2/2001 IN E.P.128/1998 IN TSC OS.127/1991 of PRL.SUB COURT,IRINJALAKUDA

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APPELLANT/PETITIONER:

JAYAN KUTTICHAKKU, S/O. KOCHU PAULY,
KUTTICHAKKU HOUSE, EAST CHALAKUDY VILLAGE,
MUKUNDAPURAM TALUK.

BY ADV. SRI.K.G.BALASUBRAMANIAN

RESPONDENTS/DECREE HOLDER & JUDGMENT DEBTORS 3 TO 9:

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1. COMMON MAN CHITTIES AND LOANS (P) LTD., THRISSUR.

2. K.A.LILLY D/O. -DO- -DO- -DO-

3. K.A.SUNNY S/O. -DO- -DO- -DO-

4. K.A.MARY, D/O. -DO- -DO- -DO-.

5. K.A.KOCHUPAULY, S/O. -DO- -DO- -DO-.

6. K.A.ROSY D/O. -DO- -DO- -DO-.

7. K.A.LUCY,D/O. -DO- -DO- -DO-.

8. K.A.GEORGE, S/O. -DO- -DO- -DO-.

R1 BY ADV. SRI.K.V.SADANANDA PRABHU
R2 BY ADV. SRI.K.N.CHANDRABABU

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON 03/07/2006,

ALONG WITH EFA NO. 38 OF 2001, THE COURT ON 04/12/2006 DELIVERED THE FOLLOWING:

ORDER ON C.M.P.6987/2001 IN E.F.A.NO.37 OF 2001

DISMISSED.

4/12/2006. SD/- THOTTATHIL B. RADHAKRISHNAN, JUDGE.

- TRUE COPY-

P.S.TO JUDGE.

THOTTATHIL B. RADHAKRISHNAN, J.

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E.F.A.Nos.37 & 38 of 2001

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Dated this the 4th day of December, 2006.

JUDGMENT

The appellant's grandfather, Kuttichakku Agasthy and his legal representatives were defendants in various suits. The decree against them in O.S.No.521/1991 of the Irinjalakuda Munsiff's Court led to Ext.A2 sale certificate in favour of the decree holder in that case. By Ext.A1, the appellant got assignment of Ext.A2 property. On the strength of such title, he filed claim petitions in the course of execution of two other decrees against his grandfather's estate and heirs. The court below dismissed those claims holding that the decree holder in O.S.No.521/1991 took Ext.A2 sale certificate with the encumbrances noticed therein as " (Badhyatha Edakkudi), which were the liabilities in about 18 suits in different courts, including the suits

from which these appeals arise and therefore, he and the claim petitioner, his transferee under Ext.A1, are bound by those encumbrances. Hence, these appeals.

2. In support of these appeals, it is argued that what subsisted in the suits enlisted in Ext. A2 were only attachments and therefore not encumbrances and would not, in law, affect Ext.A2 sale. Citing the decision of this Court in **Iyyunni v. Anto [1994 (1) KLT 583**], it is contended that an attachment does not create any title and it is not an encumbrance or a charge on the property. The decision of this Court in **Kunjikavu Amma v. Janaki Amma and others (1957 KLT 392)** is relied on to argue that court sales are not free from encumbrances and the purchaser gets the property with all the defects in the judgment debtor's title and that, therefore, if encumbrances subject to which the property is sold turn out to be invalid, the benefit goes exclusively to the purchaser. It is thus canvassed that there were only attachments in favour of the decree holders in the different

suits and the reference in Ext.A2, to such debts, is of no consequence.

3. Per contra, it is argued on behalf of the decree-holder that the entries in Ext. A2 regarding the different suits were, made at the instance of and obviously, with the knowledge of the legal representatives of Agasthy and the decree holder - auction purchaser in that suit, has consciously taken that court sale with the said terms, thereby, resulting in the creation of a charge. It is further urged that the court sale resulting in Ext. A2 sale certificate dated 30.11.1999, followed by Ext. A1 sale, within an year, on 11.7.2000, in favour of the appellant, then a student, who is none other than a grandson of Agasthy, is a mechanization of the appellant's father and the other heirs of Agasthy, in collusion with the decree holder - auction purchaser in Ext. A2, to defeat the interest of the other creditors, which fraud deserves to be denounced by the courts of justice.

4. Section 100 of the Transfer of Property Act ("TP Act", for short) provides that where immovable property of one person is made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. A charge is enforceable against the property over which charge is created. This is explicit from Section 100 itself, which provides that all provisions which apply to a simple mortgage shall, so far as may be, apply to a charge and that no charge shall be enforced against any property in the hands of a person to whom the property over which a charge is created, has been transferred for consideration and without notice of the charge, unless such enforcement is otherwise expressly provided by any law for the time being in force.

5. "Encumbrance" and "incumbrance" are the same. That term is not defined in the TP Act. **Encumbrance** is a legal claim on an estate (see **Chambers's Twentieth Century**

Dictionary). Where the statute under consideration did not define the term "incumbrance", the Apex Court in **National Textile Corpn. v. State of Maharashtra, (1977) 3 SCC 4**, referred to **Wharton's Law lexicon** to notice "incumbrance" as a claim, lien or liability, attached to property. This is the sense in which the term is ordinarily used. An incumbrance, in this sense, has to be a liability "attached to property"; it must be a burden or liability that runs with the land. It was held by the Supreme Court in **State of H.P. v. Tarsem Singh, (2001) 8 SCC 104**, that the word "encumbrance" means a burden or charge upon property or a claim or lien upon an estate or on the land and that the word "encumber" means burden of legal liability on property. Therefore, a charge created in terms of Section 100 of the TP Act is an encumbrance. May be that, going by the second paragraph of Section 100, it cannot be enforced against the charged property, while in the hands of a transferee for consideration and without notice of the charge.

6. The enlistment in Ext.A2 as (Edakkudi Vivaram) is as (Badhyatha Edakkudi). (Badhyatha) means claim/liability. (Edakkudi) means encumbrance. [See **Kunjikavu Amma (supra)**].

7. Attachments, by themselves, do not amount to creation of charges and are therefore not encumbrances. In **Iyyunni (supra)**, this Court concurred with the views of the Patna High Court and the Karnataka High Court that an attachment does not create any title and that it does not result in an encumbrance on the property which is liable to be specified in the proclamation under Order XXI Rule 66(2) of the CP Code. It was held that an attachment only interdicts any private transfer or delivery of the property or of any interest thereon and that it does not create any encumbrance on the property. The Apex Court, in **S.Noordeen v. V.S.Thiru Venkita Reddiar [(1996) 3 SCC**

289] held as follows:

> "The attachment before the judgment is an encumbrance preventing the owner of the property to create encumbrance, sale or create charge thereon. Attachment before judgment does not create any right, title or interest, but it disables the judgment-debtor to create any encumbrances on the property. Ultimately, when decree is passed, the property forms part of the decree so as to enable the decree-holder to proceed with against the property to realise the decree debt. The question is: whether the properties which are not part of the schedule mentioned in the suit will nonetheless be the part of the decree? It is not mandatory that the property should be specifically mentioned; it is so only in a mortgage suit under relevant clauses of Order 34 of the Code. The decree-holder is entitled to proceed against those items mentioned in the petition. The decree would be executed as provided in other mode of the decree. In other words, attached properties are also liable to be sold as integral part of the decree. The properties, though do not form part of the schedule, would also become part of the decree."

It was accordingly held that though attachment before judgment does not create any encumbrance, it disables the creation of any further encumbrance by the judgment debtor and when decree is

passed, the property forms part of the decree so as to enable the decree holder to proceed with, against the property, to realise the decree debt, though the property does not form part of the schedule to the decree. This does not, in any manner, impair the inter-se rights of the different attachment holders referable to Section 73 of the CP Code or other principles relating to priorities among the attaching creditors.

8. Applying the aforesaid principles, if one were to go merely by the priority of attachments in the different suits enumerated in Ext.A2, the attaching creditors would not have any right to have such attachments treated as encumbrances.

9. However, what has to be considered in these cases is the effect of making the entry (Edakkudi Vivaram), in Ext.A2, in the manner in which it has been made. Do the entries in Ext.A2 as (Edukkudi Vivaram) have the effect of creation of charge on the properties

covered by Ext.A2 sale?

10. The relevant recitals in Ext.A2 are as follows:

11. The endorsement on Ext.A2 as " (Edakkudi Vivaram) and " " (Badhyatha Edakkudi) are not transfers by the Court, like a sale in execution, and therefore, not creation of charge by operation of law. What then, is the legal effect of enlisting the various pending litigations

involving the judgment debtor, as encumbrances, in the sale certificate, Ext.A2? Can the said endorsement amount to creation of charge by act of parties?

12. In **M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons, (1969) 1 SCC 573,** it was argued that Section 100 of the TP Act attracts Section 59 and that a charge can be created only by a document signed, registered and attested by two witnesses in accordance with Section 59 where the principal money secured is Rs.100/- or upwards. In that case, the High Court of Madras accepted such contention following its earlier decisions in **Viswanadham v. Menon - ILR 1939 Mad 199** and **Shiva Rao v. Shanmugasundaraswami - ILR 1940 Mad 306** and held that the security bond was invalid, as it was attested by one witness only. The Apex Court reversed the decision of the High Court. Dilating on Section 100, it was held that a charge may be

made by act of parties or by operation of law and that no restriction is put on the manner in which a charge can be made.

13. As regards the effect of amendment in Section 100 by the amending Act 20/29, the Supreme Court stated in **M.L.Abdul Jabbar Sahib (supra)** as follows:

> "Before Section 100 was amended by Act 20 of 1929, it was well settled that the section did not prescribe any particular mode of creating a charge. The amendment substituted the words "all the provisions hereinbefore contained which apply to simple mortgage shall, so far as may be, apply to such charge," for the words "all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the person having such charge". The object of the amendment was to make it clear that the rights and liabilities of the parties in case of a charge shall, so far as may be, the same as the rights and liabilities of the parties to a simple mortgage. The amendment was not intended to prescribe

any particular mode for the creation of a charge."

(emphasis supplied)

14. How did the court executing the decree leading to Ext.A2 come to know about the different litigations, that too, pending before different courts at the instance of different persons against Agasthy and his heirs? That could have been only on the representation of the parties to the execution proceedings leading to Ext.A2. Therefore, it was the clear intention of the parties to the execution proceedings leading to Ext.A2, to create charge over the property in favour of the creditors who were suing in the enlisted litigations. There was thus a conscious creation of a charge by act of parties while the sale leading to Ext.A2 was held, affirmed and confirmed. Consensus ad idem between the parties to that proceedings, in that regard, is writ large and is the inescapable inference on the facts, evidence and circumstances of the case. It has necessarily to be taken that such inclusion of a provision by way of charge in the sale certificate was made at the

instance of, and with the consent of, the parties to the execution proceedings in which the said sale took place. This is so because, there is no other way to assume the manner in which the suits enlisted in Ext.A2 would have been brought to the notice of the court executing the decree leading to the issuance of Ext.A2 sale certificate. So much so, it is unavailable to the heirs of Agasthy, including the appellant to contend that no charge was created and what is evidenced by Ext.A2 is not the creation of a charge. The making of the entry in Ext.A2 as "

(Badhyatha Edakkudi) amounts to creation of a charge in favour of the plaintiffs in the suits enlisted therein and such charge is one created by act of parties, namely, the judgment debtors in that suit, who are none other than the judgment debtors in the suits from which these appeals arise. The father of the appellant, also representing the estate of the judgment debtor in the suit in which Ext.A2 sale certificate was issued, cannot wriggle out of the situation by merely having Ext.A1 sale by the decree holder in Ext.A2 suit in favour of his son, the appellant, who was then only

a student, with no disclosed and proved independent source of income, to have taken Ext.A1 sale, by himself, without notice of the charge.

15. That apart, Ext.A1 assignment in favour of the appellant is made making specific reference to the charge, evidenced by Ext.A2, as found above. Therefore, the appellant is not a transferee of Ext.A2 property without notice of the charge, as aforesaid.

16. In the aforesaid circumstances, it needs necessarily to be concluded that Exts.A1 and A2 do not give the appellant any independent title in defeasance of the execution proceedings against the judgment debtors and the estate represented by them in the suits from which these appeals arise.

In the result, these appeals fail and they are

dismissed with costs throughout.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

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THOTTATHIL B. RADHAKRISHNAN, J.

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E.F.A.Nos.37 & 38 of 2001

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JUDGMENT

Dated: 4th December, 2006.